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No. 84-773

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

Michael Bender, et al.,
Petitioners,

v.

The Williamsport Area
School District, et al.
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF OF THE BAPTIST JOINT COMMITTEE ON PUBLIC AFFAIRS, THE NATIONAL ASSOCIATION OF EVANGELICALS, THE NATIONAL COUNCIL OF THE CHURCHES OF CHRIST IN THE U.S.A., AND THE PRESBYTERIAN CHURCH (U.S.A.) AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Does the decision of the United States Court of Appeals for the Third Circuit which both reversed the U.S. District Court for the Middle District of Pennsylvania and upheld Williamsport Area School District's refusal to permit a student-initiated religious group, Petros, access to the facilities of Williamsport Area High School during an established activities period on an equal basis with non-religious groups violate the First, Fifth, and Fourteenth Amendments to the Constitution of the United States?

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Pursuant to Rule 36.2 of the Rules of this Court, the organizations named above file this brief in support of Petitioners. Consent for the filing of

this brief has been obtained in writing from the attorneys of record for the parties in this case. Their original letters have been filed with the Clerk of this Court.

INTEREST OF THE AMICI CURIAE

The amici are four nonprofit religious organizations which have a continuing, vital interest in preserving religious liberties under the Constitution.

The Baptist Joint Committee on Public Affairs consists of representatives elected by each of eight cooperating Baptist conventions in the United States: American Baptist Churches in the U.S.A.; Baptist General Conference; National Baptist Convention of America; National Baptist Convention, U.S.A., Inc.; North American Baptist Conference; Progressive National Baptist Convention,

Inc.; Seventh Day Baptist General Conference; and Southern Baptist Convention. These Baptist groups have nearly 30 million members and reflect the traditional Baptist concern for proper church-state relations. The Baptist Joint Committee has as one of its mandates the obligation to respond ". . . whenever Baptist principles are involved in, or are jeopardized through, governmental action. . . ." Among Baptists, religious liberty is a fundamental and sacred principle.

The National Association of Evangelicals, located in Wheaton, Illinois, is a nonprofit association of evangelical Christian organizations, colleges and universities, as well as some 44,000 churches from 78 denominations. It serves a constituency of 10 to 15 million people through its commissions and affiliates, such as the National

Religious Broadcasters.

The National Council of the Churches of Christ in the United States of America is a federation of thirty-three Protestant and Eastern Orthodox religious bodies in the United States with aggregate membership totaling approximately 43,000,000. It is governed by a General Board of 250 members chosen by the member denominations in proportion to their size and support. The General Board determines the policies of the organization through debate, amendment and adoption of carefully-prepared statements and resolutions brought to it by its subordinate program divisions. Several of these policies affirm the principle of religious liberty, and it is on the basis of these policies that we enter this case.

The Presbyterian Church (U.S.A.) is a national, Christian denomination with churches in all 50 states. It has

approximately 3,150,000 active members and approximately 11,750 congregations organized into 195 Presbyteries and 20 Synods. The General Assembly is the highest governing body of the Church, meets annually, and is composed of approximately 600 delegates elected by the Presbyteries, known as commissioners, one-half of whom are ordained ministers, the other half ordained lay officers known as ruling elders. This brief does not purport to reflect the views of all members of the Church, but is based upon policies decided by the General Assembly or incorporated into the Constitution of the Church by vote of the Presbyteries.

Amici bring special expertise to the case at bar as a result of their participation as amicus curiae in Widmar v. Vincent, 454 U.S. 263 (1981), and their work to secure passage by Congress of The Equal Access Act, P.L. 98-377, which

guarantees rights of free speech and association of students in public secondary schools.

Amici assert that the principle of religious liberty as guaranteed by the First Amendment to the Constitution of the United States is at issue in and could be put in jeopardy by the case at bar.

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Constitution, Amendment I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Constitution, Amendment V, in part:

> No person shall be . . . deprived of life, liberty, or property, without due process of law. . . .

U.S. Constitution, Amendment XIV, in part:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Amici adopt and incorporate by reference the statement of the case as it appears in the brief filed by Petitioners.

There are, however, certain uncontested facts which amici wish to emphasize. In Bender v. Williamsport Area School District, 563 F.Supp. 697 (1983), the court quoted from the affidavit of Wayne E. Newton, Principal of the Williamsport Area High School, concerning the granting of permission to student clubs to meet during the 7:57 a.m. to 8:27 a.m. activities period. Newton stated: "Activities and clubs which promote the intellectual, physical and

social development of students have been approved as officially sanctioned student activities, permitted to meet during the school day, i.e. the activities period. . . ." 563 F.Supp. at 700, fn. 5. A student-initiated religious group calling itself Petros -- which wanted to use the activities period to read scriptures, pray, discuss religious questions, and engage in other activities of interest to the group -- asked that it be given permission to meet during the activities period and was denied permission -- the only group which had ever sought and been denied permission to meet as a sanctioned student activity.

The students exhausted their remedies by successive appeals through school channels before they brought this cause of action in the United States District Court for the Middle District of Pennsylvania. That court decided that,

under the specific fact pattern in this case, religious and secular clubs should have equal access to the use of school facilities because the school had created a limited open forum when it established an open activities period. The United States Court of Appeals for the Third Circuit reversed, concluding that First Amendment establishment clause concerns expressed by the school district must prevail over a First Amendment free speech right of the students. That decision is on appeal in the instant case.

Correlative to the fact pattern of the instant case is congressional enactment of P.L. 98-377, The Equal Access Act, after the decision of the United States Court of Appeals for the Third Circuit in the case.

SUMMARY OF ARGUMENT

Amici argue herein that under the facts in the case at bar, which are constitutionally indistinguishable from the facts in Widmar, supra, 454 U.S. 263, permitting Petros to meet during the student activities period would not be state action constituting an establishment of religion. To the contrary, refusing the students permission to meet impermissibly burdened their free exercise, free speech and equal protection rights. Further, amici argue that it is bootstrapping to claim the establishment clause as a compelling state interest under the free exercise clause or the free speech clause.

ARGUMENT

PREAMBLE

Though the Declaration of Independence and the works of many responsible scholars assert that natural rights exist, constitutional jurisprudence in the United States rests on an assumption that substantive individual and corporate rights are products of limitations on government power. Hence, the Bill of Rights begins with the phrase, "Congress shall make no law...." Through a series of cases the Supreme Court has held that the phrase in the Fourteenth Amendment "nor shall any State deprive any person of life, liberty, or property, without due process of law" has made the First Amendment limitations applicable to the states. Cantwell v. Connecticut, 310 U.S. 296 (1940) (religion clauses); Gitlow v. New York, 268 U.S. 652 (1925), Whitney v. California, 274 U.S. 357

(1927) (speech and press); DeJonge v. Oregon, 299 U.S. 353 (1937) (assembly and petition).

The First Amendment is couched in absolute terms. However, the limitations which this Amendment places on all levels of government are not absolute. The absoluteness of the words of the establishment clause has been tempered by judicially-established tests for determining the state action which, in fact, constitutes establishment. See, Lemon v. Kurtzman, 403 U.S. 602 (1971). Courts have permitted some burdening of the free exercise of religion where a state can demonstrate a compelling interest for doing so and can show that such an interest cannot be served by less restrictive means. See, Wisconsin v. Yoder, 406 U.S. 205 (1972). The compelling interest test is also applicable to the free speech clause of the First Amendment. See,

Schenck v. United States, 249 U.S. 47 (1919).

There are tensions between the First Amendment's establishment and free exercise of religion clauses. See, Walz v. Tax Commission, 397 U.S. 664, 668 (1970). There are similar tensions between the religion clauses and the other First Amendment clauses. The tensions which exist between the religion clauses and the free speech clause may require that the courts employ a difficult balancing of rights. However, there is nothing either specific or inherent in the First Amendment that either requires or allows a state to make decisions on the permissibility or impermissibility of speech in public secondary schools solely on the basis of the religious content of that speech.

The establishment clause may forbid religious speech in public schools under

specific circumstances. But the circumstances -- the facts of the case -- are dispositive. Under the narrow facts of the case at bar the First Amendment does not provide grounds for limiting the religious speech which Petros sought. The Williamsport Area High School and its school board, by limiting and even denying the speech of Petros solely on the basis of religious content, made discriminations not permitted by the First Amendment.

I.

The establishment clause does not require that Petros be denied equal access to the use of the facilities at Williamsport Area High School.

The Supreme Court in Lemon, supra, at 612, 613, spelled out three tests for determining when state action constitutes an establishment of religion. Amici assert that an approval of Petros' request for the status of a school-

sanctioned student club would not fail any of the tests. Our assertion, analyzed below, is bolstered by Widmar, supra, at 271, "It does not follow . . . that an "equal access" policy would be incompatible with this Court's Establishment Clause cases." Enactment of P.L. 98-377, The Equal Access Act, after the decision of the United States Court of Appeals for the Third Circuit in the instant case further bolsters our assertion. The substantial majorities in both houses of Congress attest to their independent determination that "equal access" as embodied in that statute, which closely tracks the Williamsport fact pattern, is constitutional.

1. The secular purpose test: Despite the fact that the Supreme Court's opinion in Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 512 (1969), can be read to

imply that all public schools are open forums, amici do not agree that such is the case. We do not believe that a public school can be an unlimited open public forum by its very nature.

However, we assert that some public schools can have created within them limited open forums. There are distinct differences between elementary and secondary schools. Primarily because of the immaturity of elementary school students and both the nature and the rigid structure of an elementary school curriculum, it is unlikely that a limited open forum would be created in an elementary school through actions of teachers, administrators or school boards. However, a higher degree of maturity in secondary school students and a more flexible secondary school curriculum make it entirely possible for administrators or a school board to create a limited open forum in a

secondary school.

The facts in the instant case demonstrate that a viable, diverse and highly visible limited open forum for student organizations had been established by the Williamsport Area High School well before Petros sought permission to become part of that forum. The Williamsport forum was created for all student groups which would "contribute to the intellectual, physical or social development of the students" [741 F.2d 538 (1984), at 544]. Non-religious student groups had participated in that forum for a number of years before Petros sought to be included. It is clear that the Williamsport forum, like the forum in Widmar, supra, at 273, where a University had opened its facilities for use by student groups, was not created for religious purposes; it was created for purely secular purposes. Hence this

constitutional test has been satisfied.

2. The principal or primary effect test: This test requires that the principal or primary effect of state action must neither advance nor inhibit religion. Lemon, supra, at 612. Rather government is limited to "a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference." Walz, supra, at 669. See also, Epperson v. Arkansas, 397 U.S. 97, 103, 104 (1968). This Court in its Widmar, supra, decision indicated that dominance of the open forum is a key factor when at 275 it held that, so long as the religious group did not dominate the open forum at the University of Missouri at Kansas City, "advancement of religion would not be the forum's 'primary effect.'" The record is void of empirical evidence that Petros would dominate Williamsport Area High School's

limited open forum. Only 45 students attended the lone Petros meeting allowed by the school's administration -- clear evidence that this group was not going to dominate the forum. If anything, such a small number of interested students is counterindicative of any dominance whatsoever.

Respondents have asserted that Widmar is irrelevant to the case at bar because Widmar dealt with a college situation versus a secondary school situation in the instant case. Previous decisions of this Court clearly indicate that the Widmar and Williamsport Area High School situations are analogous. In Tinker, supra, at 512, -- a secondary school case -- this Court quoted Justice Brennan speaking for the Court in Keyishian v. Board of Regents of the University of the State of New York, 385 U.S. 589, 603 (1967). Justice Brennan characterized

the Keyishian university community as a marketplace of ideas in which future leaders are trained "through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.'" The Court then directly applied Justice Brennan's description of a university as an open forum to that type of forum it saw existing in a (Tinker) secondary school.

Just as in Tinker the Court found no difference of constitutional dimensions between the First Amendment rights of college and high school students, so here, too, there is no difference of constitutional dimensions between the rights of the students in Widmar and in the Williamsport Area High School.

The Supreme Court has made distinctions between elementary and secondary

school students on one hand and college students on the other, see, Tilton v. Richardson, 403 U.S. 672 (1971), Roemer v. Maryland, 426 U.S. 736 (1976), based largely on differences in maturity levels of the two groups of students. To treat all students from kindergarten through grade 12 as a homogeneous group is unreasonable; but it is reasonable to assume that secondary school students have sufficient maturity to understand the difference between a secondary school sanctioning a group such as Petros, along with numerous other student-initiated groups, versus either sponsoring or promoting that group. According to Concise Oxford Dictionary, 1983 edition, to "sanction" means to "express authoritative permission." It does not mean approval, promotion or support. High school students are mature enough to understand that. They did understand it

in Williamsport Area High School.

To argue that sanctioning the inclusion of Petros in an existing limited open forum would communicate state approval of religion because the students are required by law to be in the school building is to muddy the distinction between state action and individual action. State compulsory attendance laws place all Williamsport students in homeroom. There state action ends on activity period mornings. A student's individual freedom of choice then takes over. The facts in Williamsport are not those of Engel v. Vitale, 370 U.S. 421 (1962), and Abington v. Schempp, 374 U.S. 203 (1963).

In the latter, religious activity was the only activity scheduled for the students; it was set up and directed by school authority; the only "voluntary" individual (student) action was

conspicuously leaving the activity if compelled by conscience. In contrast, at Williamsport Area High School "the lack of en masse activity together with the more varied alternatives reduces any perception of state approval or student embarrassment." Williamsport, supra, 563 F.Supp. at 713.

Amici assert the truly voluntary existence of the religious activity (Petros) and the truly voluntary nature of a student's choice to leave homeroom in Williamsport Area High School. Amici both agree with and adopt Judge Adams' position as set forth in the appellate court's dissent that "in view of the voluntariness of a student's decision to attend a specific activity, the fact of compulsory attendance is irrelevant." 741 F.2d at 566.

Moreover, there is a constitutionally significant difference in the role

played by Engel and Schempp teachers and the role of the Williamsport teacher/monitor. The mere presence of an adult monitor (teacher or otherwise) in a nonparticipatory capacity, to take roll and ensure order, does not communicate government endorsement, promotion or sponsorship of religion.

The argument that the action of Williamsport Area High School in providing a heated and lighted room for Petros would constitute state support of religion is without merit. The Williamsport school day has begun when the activities period takes place. The building is open, it is heated, and the lights are on. Public support, if any, of Petros would be de minimis. "No perfect or absolute separation is really possible. . . ." Walz, supra, at 670. Amici agree with the District Court "that the Establishment Clause does not prohibit a de

minimis expenditure from the public fisc to incidentally aid religion." Williamsport, supra, 563 F.Supp at 715.

Of course, meetings of Petros would advance religion; but "[a]ny advancement of religion would come from the students themselves, and this the Establishment Clause does not bar, it being a limitation on government conduct rather than on individual activity." Williamsport, supra, 563 F.Supp at 711. Sanctioning the inclusion of Petros in Williamsport Area High School's existing limited open forum would not violate the "primary effect" test.

3. **The entanglement test:** Amici assert that, besides not violating the "primary effect" test by communicating government endorsement of religion, the presence of a non-participating agent of the state -- i.e. monitor or record keeper -- at a meeting of Petros would not

constitute excessive entanglement of government with religion. "The test is inescapably one of degree." Walz, supra, at 674. The Williamsport school day has begun when the activities period takes place; therefore, students must be accounted for somewhere in the building and order must be maintained. A teacher or other employee of the school system who is present in the room assigned Petros during the activities period would be carrying out routine functions. The degree to which such a person would be entangled, if any, with the religious expression taking place within the meeting would be negligible.

The court below (741 F.2d at 555) describes the entanglement test as

> "essentially a procedural problem." (Roemer v. Board of Public Works, 426 U.S. 736, 755 (1976) (Blackmun, J., for the plurality). Government must avoid excessive entanglement with religion where "continuing state surveillance will inevitably be

> required to ensure that [the] restrictions [of] . . . the First Amendment [are] respected." Lemon, 403 U.S. at 619.

The routine tasks of taking roll and ensuring order assigned a Petros monitor fall far short of maintaining such surveillance. Nor is such surveillance required considering the student-initiated, voluntary nature of the activity.

The preceding discussion, amici contend, amply supports our initial assertion that allowing Petros to meet does not constitute an establishment of religion. However, assuming, arguendo, that some small degree of establishment were involved, it is clear that student free exercise and free speech rights are also involved. Laurence H. Tribe, Professor of Law at Harvard Law School, maintains in American Constitutional Law, p. 819, "Whenever a free exercise claim conflicts

with an absolute non-establishment theory, the support of the former would be more faithful to the consensus present at the time of the Constitutional Convention and of the First Congress."

II.

Failure to grant Petros permission to meet as a part of a limited open forum violates free exercise of religion rights.

Students have no unqualified right to corporate free exercise of religion in the public schools. However, in the instant case, the state, by denying Petros permission to meet during the activities period, burdened the free exercise of religion of Petros' members. In Yoder, supra, the Supreme Court set out its tests for determining when state action unconstitutionally infringes on the free exercise of religion. Yoder requires that the state demonstrate a compelling interest which cannot be

served by less restrictive means if the burdening is to be constitutional. The Court made the test more rigorous in Elrod v. Burns, 427 U.S. 347, 362 (1976): "The interest advanced must be paramount, one of vital importance, and the burden is on the government to show the existence of such an interest."

Respondents argued below that they were required by the establishment clause of the First Amendment to deny Petros access equal to that enjoyed by other student groups in the use of school facilities during the activities period. The District Court below, as well as the Supreme Court in Widmar, denied that interpretation of the establishment clause. Neither case has facts to support an establishment clause requirement to exclude religious groups from a limited open forum which they fail to dominate.

The court in Brandon v. Board of Education of Guilderland School District, 635 F.2d 971 (1980), cert. denied, 454 U.S. 1123 (1981), (decided before Widmar, cert. denied after Widmar without a reason given for denial) used the "compelling state interest" test in two different ways. At one point the court agreed with the school board that the establishment clause constituted a compelling state interest for refusal of students' request for the use of school facilities before the school day began. Brandon, supra, at 978. (Amici's opinion is that by dropping the reference to Brandon in fn. 13 in the Widmar slip opinion the Supreme Court indicated that it had overlooked the presence of other student groups meeting outside of regular school hours.) We disagree with the court's finding that the establishment clause can be a "compelling state interest" for

burdening the free exercise of religion.

At another point the court in Brandon, supra, at 976, correctly stated the "compelling state interest" test:

> A limitation on religious exercise is justified only if the state can demonstrate that its compelling interest in public health, welfare, morality, or other secular values justifies the restriction, and that less restrictive means to achieve the state's secular ends are not available.

Amici accept the court's statement above as the proper test. We assert that the establishment clause cannot properly be argued as a compelling state interest in the state's burdening of the free exercise of religion. The only compelling interest for which the state may burden free exercise is its interest "in public health, welfare, morality, or other secular values. . . ."

The establishment clause limits government power. A limit on state action cannot reasonably constitute a

compelling state interest for burdening First Amendment rights of citizens. The state has an obligation under the Constitution not to take actions "respecting an establishment of religion." The constitutionality of the state's actions under the establishment clause are subject to the Lemon tests. It is bootstrapping to claim the establishment clause as a compelling state interest under the free exercise clause. Not only the establishment clause but also the free exercise clause is a limit on government power. Both are designed to secure religious liberty. To argue that one can be considered a "compelling state interest" to swallow the other destroys the very religious liberty that the two clauses were intended to preserve.

In the case at bar the state has clearly burdened the free exercise rights of a group of students (Petros) without

demonstrating a compelling state interest "in public health, welfare, morality, or other secular values." Even assuming, arguendo, that the establishment clause may be a compelling state interest, as noted in Argument I the establishment clause would not be offended by granting Petros access to the use of school facilities on an equal basis with student groups which have secular purposes.

In Walz, supra, at 668, Mr. Justice Burger said, "The Court has struggled to find a neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other." Considering these words to be very descriptive of the Court's role in the case at bar, amici urge that the neutral course here lies in honoring the distinction between

state action and student-initiated action.

III

The free speech of the student members of Petros may not be restricted solely because that speech has a religious content.

Freedom of speech is not absolute. One cannot falsely cry "Fire!" in a crowded theater. See, Schenck, supra. Public profanity and fighting words may be banned. There are other legitimate limitations on free speech, but as the Supreme Court said in Terminiello v. City of Chicago, 337 U.S. 1, 4 (1949), ". . . freedom of speech, though not absolute, . . . is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest."

Widmar, supra, was decided on the

basis that the state had unconstitutionally limited the free speech and association rights of student members of Cornerstone. The District Court below applied Widmar to the instant case. Amici have argued above that it was correct to do so. Free speech rights of students in our public schools are not to be infringed for unconstitutional reasons. "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." Tinker, supra, at 506. The Court further said, at 513:

> Under our Constitution, free speech is not a right that is given only to be so circumscribed that it exists in principle but not in fact. Freedom of expression would not truly exist if the right could be exercised only in an area that a benevolent government has provided as a safe haven for crackpots. The Constitution says that Congress (and the States) may not abridge the right to free speech. This provision means what it says. We properly read it to

> permit reasonable regulation of speech-connected activities in carefully restricted circumstances. But we do not confine the permissible exercise of First Amendment rights to a telephone booth or the four corners of a pamphlet, or to supervised and ordained discussion in a school classroom.

"Reasonable regulation of speech-connected activities" does not comprehend the limiting of speech simply because that speech has religious content.

Religious speech in public schools may be limited. See, Engel, supra, 370 U.S., Schempp, supra, 374 U.S. These "school prayer cases" involved state-required, state-written, state-sponsored, and state-supervised religious exercises. State action respecting an establishment of religion was involved. The only state action involved in the instant case was the creation of an activities period and the refusal to grant permission for Petros to meet. Petros was a student-initiated, exclusively student-run group.

The religious speech to be incorporated in the group's meetings was entirely private action, not state action. The state prohibited speech solely because of its religious content. This the state may not do. "In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views." Tinker, supra, at 511. Respondents persist in their attempt to bootstrap the establishment clause limits into a compelling state interest, solely to limit the free speech of the Petros students because of the religious content of that speech.

"Our courts . . . have not failed to apply the First Amendment's mandate in our educational system where essential to safeguard the fundamental values of freedom of speech and inquiry and of belief." Epperson, supra, at 104. Freedom of

speech, which the Court called a fundamental value, has been severely limited by state action in the instant case solely on the basis of the religious content of the speech of student members of Petros. The First Amendment mandates that the state, not private persons, be the object of severe limitations as it seeks to deal with this fundamental value.

IV

The actions of Respondents in refusing Petros access to school facilities during the activities period on an equal basis with other student groups deny to Petros the equal protection of the laws.

Religious organizations may not be denied the equal protection of the laws simply because they are religious. The Fourteenth Amendment's equal protection of the laws clause and the equal protection component of the due process of law clause of the Fifth Amendment clearly

require the state to treat persons equally unless there are constitutional reasons to do otherwise. There are instances where fact patterns require the balancing of rights and thus require that the state treat religious and secular groups unequally. However, the facts in the case at bar do not require that the Petros group, a religious group, and the other secular student groups be treated unequally.

In an entirely different context the Supreme Court in Yick Wo v. Hopkins, 118 U.S. 356, 373, 374 (1886), said that if a state action which is facially fair and impartial is administered "so as practically to make unjust and illegal discriminations between persons in similar circumstances . . . the denial of equal justice is still within the prohibition of the Constitution." The obvious discriminations between Petros and the

secular-purpose student groups at Williamsport Area High School are patently a denial of equal justice. The discriminations were purely on the basis of the religious purpose on which Petros was organized. As such the discriminations were "unjust and illegal" and denied to student members of Petros the equal protection of the laws.

CONCLUSIONS

The proper role of religion in the public schools is an emotional, divisive issue in American public life. Both persons who want religious exercises in public schools and persons who want no mention of religion and no religious speech in public schools have interpreted the Supreme Court's establishment clause cases as banning God and prayer from the schools. Amici assert that this

interpretation is incorrect.

Amici firmly oppose establishment of religion in schools by government's mandating, sponsoring, initiating, promoting or organizing religious activity. Amici are equally concerned that religious speech not be discriminated against because of its religious content and that public school students not experience an official state hostility toward religion.

Judge Adams, in dissenting from the opinion below, clearly describes amici's concern and a primary perspective from which we approach the case at bar:

> To the extent the majority is concerned about impressionability of high school students, they are required to consider that the exclusion of Petros will introduce content-based restrictions in an otherwise open forum that may in fact be understood as a manifestation of official hostility towards religion. It is well settled that the First Amendment proscribes governmental hostility towards religion, as well as governmental promotion of religion. . . . When this Court sustains Williamsport's decision not to permit

> meetings by Petros, it sanctions a policy singling out a religious group as the only student activity ever to be excluded in the high school's history. In light of its view of the maturity of high school students, the majority . . . is obligated to explain why such a selective exclusion does not raise First Amendment problems of perceived governmental disapproval of religion. 741 F.2d at 565. (citations omitted).

> One of the great triumphs of America's constitutional experiment has been the avoidance of religious factionalism in the political sphere. Our country's continued progress in this endeavor ultimately depends on the individual citizen's tolerance and respect for religious diversity. When the schools can teach such tolerance to our young citizens without impermissibly sponsoring religion, . . . the Constitution and the Nation are the better for it. 741 F.2d at 569.

"Freedom of press, freedom of speech, freedom of religion are in a preferred position." Murdock v. Commonwealth of Pennsylvania, 319 U.S. 105, 115 (1943). Any state intrusion into religious liberty requires strict scrutiny. Limits on religious liberty are permitted only when the heaviest

burden of proof has been borne by the state. Respondents have not demonstrated either an establishment case or a compelling state interest to justify limiting either the free exercise of religion or the freedom of speech of Petros' members. Respondents have not justified denying equal protection of the laws to Petros' members. "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." Shelton v. Tucker, 364 U.S. 479, 487 (1960).

For these reasons amici respectfully request that this Court uphold the right of the Petros students to meet in Williamsport Area High School. We do so with the assurance that future imitations of Williamsport's activities period will not be allowed to violate the constitutionally required separation of church and state "while this court sits." See,

the Supreme Court's quoting with approval from Justice Holmes' dissent in Panhandle Oil Company v. Mississippi, 277 U.S. 218, 223 (1928) in Marsh v. Chambers, ____ U.S. ____, 103 S.Ct. 3330, 3337 (1983).

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CERTIFICATE OF SERVICE

I, Donald R. Brewer, do certify that two (2) copies of Brief of the Baptist Joint Committee on Public Affairs, the National Association of Evangelicals, The National Council of the Churches of Christ in the U.S.A., and the Presbyterian Church (U.S.A.) as Amici Curiae in Support of Petitioners were today, May 6, 1985, mailed by United States Mail, first class postage paid, to the following:

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